

Tribunal meeting number 175 / Case 2

Case reference: 81837
Level 2 provider: New SMS Media Ltd (UK)
Type of service: Adult video service
Level 1 provider: N/A
Network operator: N/A

THIS CASE WAS BROUGHT AGAINST THE LEVEL 2 PROVIDER UNDER PARAGRAPH 4.4 OF THE CODE

BACKGROUND

On 23 July 2015, a PhonepayPlus Tribunal considered a case concerning adult video services (the “**Service(s)**”) which were operated by the Level 2 provider, New SMS Media Ltd (the “**Level 2 provider**”) until January 2014 when the Services were novated to another Level 2 provider.

The Tribunal upheld three breaches of the PhonepayPlus Code of Practice (12th Edition) in relation to fair and equitable treatment, consent to charge and consent to market. The Tribunal concluded that the seriousness of the case should be regarded overall as very serious.

The Tribunal imposed the following sanctions on the Level 2 provider:

- a formal reprimand;
- a warning that if the Level 2 provider fails to demonstrate that it has robust verifiable evidence of consumer’s consent to charge in the future it should expect to receive a significant penalty;
- a fine of £200,000;
- a requirement that, within three months of the Level 2 provider re-commencing trading, the Level 2 provider submit to a compliance audit of its procedures for ensuring consumers provide valid consent to be charged and that it has robust verifiable evidence of that consent, the recommendations of the audit must be implemented within a period defined by PhonepayPlus, the audit must be conducted by a third party approved by PhonepayPlus and the costs of such audit must be paid by the Level 2 provider; and
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

The Tribunal additionally recommended that PhonepayPlus impose 100% of the administrative costs incurred in relation to the case. The total administrative charge was £11,177.43.

Formal notification was sent to the Level 2 provider by email and post on 5 August 2015. The formal notification comprised of:

- a cover letter dated 5 August 2015;
- the Tribunal’s decision of 23 July 2015;
- an invoice (no:13171) for payment of the fine of £200,000;



- a further separate invoice (no:13172) for payment of the administrative charge of £11,177.43; and
- a request for the Level 2 provider to provide contact details for complainants to claim refunds in accordance with the refund sanction imposed by the Tribunal.

The total sum, representing both the fine and the administrative charge, owed to PhonepayPlus was £211,177.43.

The adjudication letter that was sent to the Level 2 provider on 5 August 2015 contained a request that the Level 2 provider supply its contact details for complainants to claim refunds. The Executive did not receive the requested contact details from the Level 2 provider. The Executive had not received any evidence that the required refunds had been made.

Payment of the invoices for both the fine and the administrative charge were to be received within seven working days of notification of the adjudication, being 14 August 2015.

On 12 August 2015, the Executive issued the Level 2 provider with a reminder that the payment of the invoices was outstanding and due. The Level 2 provider failed to respond.

The deadline was not met. As at 8 September 2015 no payment had been received.

Having received no further correspondence from the Level 2 provider regarding the outstanding invoice, on the 17 August 2015 the Executive issued a failure to comply with sanction notice.

The investigation

The Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (13th Edition) (the "**Code**").

The Executive sent a breach letter to the Level 2 provider on 8 September 2015. Within the breach letter the Executive raised the following breaches of the Code:

- Paragraph 4.8.5(b) – Failure to comply with sanctions
- Paragraph 4.10.2 – Non-payment of an administrative charge

The Level 2 provider did not respond to the breach letter. On 29 October 2015, the Tribunal reached a decision on the breaches raised by the Executive.

The Tribunal considered the following evidence in full:

- The post adjudication notification sent to the Level 2 provider, including the fine and administrative charge invoices and the refund request;
- The Tribunal decision against the Level 2 provider dated 23 July 2015;
- Correspondence from the Executive to the Level 2 provider;
- The breach letter dated 8 September 2015; and
- Confirmation of delivery of correspondence including the breach letter to the Level 2 provider.

Preliminary issue

In light of the Level 2 provider's total failure to respond to correspondence, the Tribunal asked the Executive by what means it had served correspondence on the Level 2 provider, and what



confirmations of service it had received. The Tribunal was satisfied that the breach letter had been properly served on the Level 2 provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Paragraph 4.8.5(b)

“The failure of any relevant party to comply with any sanction within a reasonable time will result in... a further breach of the Code by the relevant party, which may result in additional sanctions being imposed”

1. The Executive noted that on 23 July 2015, the Tribunal adjudicated on a service operated by the Level 2 provider. As set out in the “Background” section above, the adjudication resulted in the imposition of sanctions, including a fine of £200,000 and a refund sanction.

On 5 August 2015, the Executive sent the Level 2 provider notification of the adjudication, together with an invoice (no:13171) for payment of the £200,000 fine. Payment was to be made within seven working days of receipt of the invoice. The deadline for compliance with the fine sanction, being 14 August 2015, passed without payment being made. The Executive had not as at 8 September 2015 received payment of the fine.

The Executive also issued a form which the provider was required to complete to ensure compliance with the refund sanction. The Level 2 provider was directed to return the completed form within 48 hours and provide contact details to ensure that complainants could request and receive their refunds. The Executive did not receive a response from the Level 2 provider. The Executive submitted that there was no evidence to suggest that the Level 2 provider had complied with the refund sanction.

Accordingly, the Executive submitted that the Level 2 provider had acted in breach of paragraph 4.8.5(b) of the Code.

2. The Level 2 provider did not provide a response to the breach letter.
3. The Tribunal considered the Code and all the evidence before it. The Tribunal found that the Level 2 provider had not complied with the fine and refund sanctions imposed by the previous Tribunal. Accordingly, the Tribunal upheld a breach of paragraph 4.8.5(b) of the Code.

Decision: UPHELD

ALLEGED BREACH 2

Paragraph 4.10.2

“Non-payment of the administrative charge within the period specified by PhonepayPlus will be considered a breach of the Code and may result in further sanctions and/or legal action.”

1. The Executive noted that on 23 July 2015, the Tribunal recommended that PhonepayPlus invoice 100% of the administrative charges incurred by PhonepayPlus in relation to the case against the Level 2 provider.

On 5 August 2015, the Executive sent the Level 2 provider notification of the adjudication, together with an invoice (no: 13172) for payment of the administrative charge of £11,177.43. Payment was to be made within seven working days of receipt of the invoice.



As set out in the "Background" section above, the deadline for payment on the invoice, being 14 August 2015, passed without payment being made. The Executive had not as at 8 September 2015 received payment of the invoice.

Accordingly, the Executive submitted that the Level 2 provider had acted in breach of paragraph 4.10.2 of the Code.

2. The Level 2 provider did not provide a response to the breach letter.
3. The Tribunal considered the Code and all the evidence before it. The Tribunal found that the Level 2 provider had not paid the administrative charge. Accordingly, the Tribunal upheld a breach of paragraph 4.10.2 of the Code.

Decision: UPHELD

SANCTIONS

Initial overall assessment

The Tribunal's initial assessment of the breaches of the Code was as follows:

Paragraph 4.8.5 (b) – Failure to comply with a sanction

The initial assessment of paragraph 4.8.5(b) of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider's failure to pay the fine and comply with the refund sanction demonstrated fundamental non-compliance with the obligations imposed by the Code, which, in the view of the Tribunal, undermined public confidence in the regulatory regime and premium rate services.

Paragraph 4.10.2 – Non-payment of an administrative charge

The initial assessment of paragraph 4.10.2 of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider's failure to pay the administrative charge demonstrated fundamental non-compliance with the obligations imposed by the Code, which, in the view of the Tribunal, undermined public confidence in the regulatory regime and premium rate services.

The Tribunal's initial assessment was that, overall, the breaches were **very serious**.

Final overall assessment

In determining the final overall assessment for the case, the Tribunal did not find any aggravating or mitigating factors.

Having taken into account the circumstances of the case, the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

Sanctions imposed



Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- a formal reprimand; and
- a prohibition on the Level 2 provider from providing, or having any involvement in, any premium rate service for a period of five years, starting from the date of publication of this decision, or until payment of the refunds, the outstanding fine and original and instant administrative charges, whichever is the later.

Administrative charge recommendation:

100%